No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF DAYTON-HUDSON CORPORATION

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Dayton-Hudson Corporation ("Dayton-Hudson") submits this brief, with the written consent of the parties, as *amicus curiae* in opposition to the argument advanced in Part II.B. of the Brief for the United States as Amicus Curiae in Support of Petitioner that this Court should overrule the long-standing principle that resale price maintenance schemes are *per se* illegal under the Federal antitrust laws.

To the extent that this *per se* rule provided an underlying basis for the Seventh Circuit decision under review, see 684 F.2d at 1234, Dayton-Hudson is appearing in support of that decision. However, Dayton-Hudson takes no position with respect to the Questions Presented by Petitioner Monsanto Company.

IDENTITY AND INTEREST OF DAYTON-HUDSON CORPORATION

A. Dayton-Hudson Corporation

Dayton-Hudson is a rapidly growing corporation engaged exclusively in retailing a broad range of consumer products. At the end of its most recent fiscal year, January 29, 1983, Dayton-Hudson operated 981 stores in 47 States, the District of Columbia and Puerto Rico, had over $5-1/2 Billion Dollars in sales, and was the fifth largest non-food retailer in the country.

Dayton-Hudson offers merchandise to consumers through eight wholly-owned, autonomously managed operating companies. Four of these companies are traditional department store groups headquartered in Minneapolis, Detroit, Phoenix and Oklahoma City which offer a wide range of products for the entire family, including consumer apparel and accessories, home furnishings and electronics. Two of the fastest growing companies are Target, which operates over 200 discount department stores in twenty States, and Mervyn's, a highly promotional, popular-priced, specialty department store company operating in the western United States. The other two operating companies conduct multi-store "specialty merchandising" operations: B. Dalton Bookseller, a national bookstore chain, and Lechmere, Inc., a popular-priced New England retailer of "hard" lines such as appliances.

In addition to these established retailing organizations, Dayton-Hudson has recently opened two new types of stores: Plums . . . The Elegant Discounter, which offers moderate to better quality designer and brand name apparel for women and men at prices 20% to 50% below conventional stores, and Pickwick, a discount book retailer.

B. Interest of Dayton-Hudson and Summary of Its Position

The retailing strategies in Dayton-Hudson's array of operating companies run the gamut from fashion-oriented department stores which provide quality merchandise and extensive service and facilities, to off-price apparel and discount book stores operating in relatively spartan surroundings and offering exceptionally low prices. Of great significance to the legal issues presented in this case, however, is the fact that most of Dayton-Hudson's growth in the last decade—a period when the corporation grew more rapidly than almost all of its national retailer competitors—has come from the discount and popular-price store groups, particularly Target and Mervyn's.

Dayton-Hudson's successful emphasis on price-oriented retailing of quality merchandise reflects the corporation's perception of a basic change in the American consumer's buying practices. This perception was described to Dayton-Hudson shareholders as follows:

> One of the most significant strategic issues to surface in recent years is the increasing importance of value to the retail shopper. We first identified this consumer focus during the 1974-75 recession, when many Americans experienced the worst economic setback they had ever known. Customers became far more alert to getting the most out of their shopping dollars. They began to scrutinize their purchases carefully, making each one more meaningful. They also made the concept of quality a more important part of their value definition.
>
> * * * * *
>
> As we developed our long-range plans during the last half of the 1970's, we recognized that this emerging value orientation signaled the need for a shift in our strategic

> direction. We began to reposition our business accordingly, directing increasing capital expansion to Target and completing our merger with Mervyn's. *Dayton-Hudson Corporation Annual Report for 1981*, p. 4.

Most recently, this perception has prompted Dayton-Hudson to launch two innovative off-price and discount retailing strategies, Plums and Pickwick.

Innovation in retailing reflecting more efficient forms of distribution to meet new customer demand is by no means unique to Dayton-Hudson. This phenomenon has often been explained by a theory known as the "Wheel of Retailing." First articulated by Malcolm McNair in the late 1950's,[1] the theory advances the proposition that new forms of retailing begin with low-margin, low-priced stores. Gradually, these innovators trade up by offering more services, higher prices and additional amenities leaving a void to be filled by the next generation of innovators. For example, department stores, once an innovative strategy themselves, were confronted by discounters in the 1950's and 1960's. As the discounters are now maturing businesses, new forms of retailing, such as off-price, no-frills stores, are entering the marketplace. Examples of these fledgling strategies relying on the value inherent in low prices exist in almost every type of retailing and in every geographic market. Clothing retailers such as Marshalls, Loehmans and Filene's Basement; bookstores such as Crown Books; and no-frills supermarkets such as Cub Foods are now commonplace.

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[1] *McNair, Significant Trends and Development in the Post-War Period, in Competitive Distribution via Free High-Level Economy and Its Implications for the Universities* (1958).

Judging by the Brief for the United States as Amicus Curiae in Support of Petitioner, however, this world of the retail store is far removed from the world of the wholesale distributor of agricultural chemicals. In Dayton-Hudson's experience, most manufacturers of basic consumer products—such as apparel, cosmetics, non-prescription drugs, and small appliances—are not concerned that retailers provide the costly "ancillary services" described in the Brief for the United States as Amicus Curiae, at pp. 14-18. Rather, consumer product manufacturers simply want their products effectively displayed at competitive prices by aggressive and popular retailers.

On the other hand, in addition to the desire of some consumer product manufacturers to limit their channels of retail distribution, inefficient retailers have a very real interest in fending off innovative competitors. And as the Wheel of Retailing theory explains, the inefficient retailer is most often vulnerable to price competition, not because the innovative discounter offers fewer "ancillary services" essential to sell the product, but rather because the inefficient retailer has become accustomed to substantial margins, or because the innovator has achieved greater cost efficiencies,[2] or, most likely, for both reasons.

Thus, a principal method by which inefficient retailers seek to thwart innovative price competition is by inducing consumer product manufacturers to refuse to sell to "discounters." Occasionally these efforts are successful, because some manufacturers are all too ready to embrace resale price main-

[2] For example, a discount chain such as Target and a small, high margin specialty retailer employ very different approaches to essential aspects of store operation such as merchandise buying and inventory levels, as well as pricing.

tenance,[3] and perhaps because other manufacturers are understandably reluctant to anger long-standing retailer customers. But in recent years, and particularly since Congress repealed the antitrust exemption for state-authorized resale price maintenance in 1975, off-price retailers have had broad access to consumer products, including most "brand name" and many "high fashion" products. Dayton-Hudson submits that, in the last decade, the performance of this intensely competitive and innovative retail marketplace has been good for consumers, good for the economy as a whole, and consistent with the objectives of Federal antitrust laws and enforcement policies.

It is in this context that Dayton-Hudson is strongly opposed to the Government's plea that this Court overrule the *per se* rule against resale price maintenance. From Dayton-Hudson's perspective, the reasons why the Government argues that manufacturers *need* the freedom to impose resale price maintenance simply do not apply to the retail distribution of most consumer products. On the other hand, were resale price maintenance not illegal *per se*, Dayton-Hudson is convinced that many consumer product manufacturers would adopt this anticompetitive device, thereby depriving efficient retailers of the opportunity to provide innovative price competition.

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[3] For example, the President of Phillips Van Heusen Corporation was reported as having said to a recent gathering of the Menswear Retailers of America:

> We [Phillips Van Heusen] fully intend to eliminate any customer of ours whom we classify as an off-price retailer or diverter.

Daily News Record, March 23, 1983, p. 2. Significantly, Phillips Van Heusen is an apparel manufacturer that also operates specialty apparel stores. *See also* Barmash, "Retailers Debate 'Off-Price' Threat," *The New York Times*, June 22, 1983, pp. 29, 32.

The Government's only response to Dayton-Hudson's concerns is to rely upon the rule of reason to deter or to punish anticompetitive types of resale price maintenance. However, Dayton-Hudson believes that the rule of reason would be largely if not wholly ineffective in policing resale price maintenance schemes for the thousands of consumer products. Not only are the rule of reason cases difficult and costly to prosecute, particularly for private plaintiffs, but in addition there is the fact that market "power" in the retail world often turns on subjective factors such as fashion and name that are not conducive to traditional rule of reason economic analysis.

For these reasons, Dayton-Hudson believes that, if this Court adopts the Government's position and eliminates the *per se* rule against resale price maintenance, the practical effect will be a return to the costly, inefficient retail marketplace engendered by the fair trade laws—only now on a nationwide basis. The Government admits that *per se* treatment is appropriate for any anticompetitive practice that "retards innovation," Brief for the United States as Amicus Curiae, at p. 21. Yet this is precisely what will happen if widespread resale price maintenance of consumer products is permitted to stifle the Wheel of Retailing. Because the Government's economic arguments against the *per se* rule are unpersuasive, and because the issue need not be reached in deciding this case, Dayton-Hudson urges the Court to reject the argument advanced in Part II.B. of the Brief for the United States as Amicus Curiae.

SUMMARY OF ARGUMENT

Part II.B. of the Brief for the United States as Amicus Curiae contains a narrow and one-sided summary of the economic arguments concerning the competitive impact of resale price maintenance. In fact, the great weight of economic authority establishes that the case for resale price maintenance rests on unsound economic theory and that the practice historically has been adopted for anticompetitive purposes and has produced anticompetitive effects. Thus, the Government's economic argument for overruling the *per se* rule should be rejected.

Petitioner does not challange the *per se* rule in its Questions Presented to this Court, and the Court of Appeals understandably treated the rule as settled law. This Court need not reach the issue, and should not overrule the *per se* rule on this record, because (i) the Government's economic argument is unpersuasive; (ii) this case does not involve the retail distribution of consumer products, where resale price maintenance would have the most anticompetitive impact; (iii) there is no evidence that legitimate manufacturer interests are inadequately met by this Court's decision in *Sylvania*, which left vertical price fixing subject to the *per se* rule but established a rule of reason test for non-price vertical restraints; and (iv) this well-settled seventy year old principle of antitrust law should only be overruled by the Congress.

ARGUMENT

A. There Is Sound Economic Support for the Per Se Rule Against Resale Price Maintenance

The government has represented to this Court that, "In the case of resale price maintenance, both the economic evidence and the adverse consequences of the opposite course dem-

onstrate that resale price maintenance should not be treated differently from all other vertical arrangements between manufacturers and their distributors."[4] However, an objective review of the petinent economic literature refutes this assertion.

In fact, economic support for resale price maintenance is both recent in origin and narrowly based.[5] This is not surprising, because resale price maintenance (a) has historically arisen out of demonstrably anticompetitive motivations, (b) rests on unsound economic theory, and (c) has, when implemented, produced patently anticompetitive results.

1. Historically, Resale Price Maintenance Has Been Adopted for Anticompetitive Purposes

The motivations of those who have historically favored resale price maintenance have tended to be anticompetitive, strongly suggesting that its results will also be anticompetitive.

> In addition to the harmful *effects* on horizontal competition, the historical record supports the idea that there may be anticompetitive *purposes* as well. The most developed literature concerning the purposes behind manufacturer control of retail prices is in the fair trade area. The history of that area reveals that resale price maintenance under the fair trade laws was virtually everywhere retailer inspired. . . .

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[4] Brief for the United States as Amicus Curiae, at p. 29.

[5] In 1963, a poll of the views of 1200 economists concerning newly proposed resale-price-maintenance legislation resulted in a response of 570 economists opposed to the legislation, one in favor and one inquiry returned without comment. *Villard*, "Opposition to the Quality Stabilization Bill," 55 *American Econ. Rev.* 683 (1965).

> The history of the fair trade laws also makes it relatively clear that once those laws were adopted, the manufacturing component of the marketing system was enlisted as an enforcing agency to further programs in the interest of retail dealers.[6]

In sum, resale price maintenance has historically been a method used by retailers to force unwilling manufacturers to act as enforcers in the protection of high retail margins.[7]

Careful studies substantiate these observations. Resale price maintenance has traditionally had as its "object" to "prevent competitors from using the offer of low prices in the competitive struggle for business, and its method was to induce manufacturers by persuasion, organized threats and by offers of support to introduce and to enforce minimum retail prices for branded goods."[8] In other words, these studies substantiate the notion that inefficient retailers have used resale price maintenance to thwart the process of retailing innovation described by the Wheel of Retailing theory.

2. The Claimed Benefits of Resale Price Maintenance Are Rejected by the Great Weight of Economic Authority

The impetus behind current efforts to rehabilitate resale price maintenance comes primarily from the work of Profes-

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[6] *Andersen*, "The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality," 54 *Wash. L. Rev.* 763, 787 (1979).

[7] *Ibid.*, quoting and relying, *inter alia*, on *Hollander, Restraints Upon Retail Competition* 48-70 (1965); and *Bowman*, "The Prerequisites and Effects of Resale Price Maintenance," 22 *U. Chi. L. Rev.* 825, 849 (1955).

[8] *Bauer and Yamey, Markets, Market Control and Marketing Reform* 297 (1968).

sors (now Judges) Robert Bork[9] and Richard Posner.[10] The Bork-Posner argument is that resale price maintenance can enhance "distributive efficiency."[11] The principal "distributive efficiency" claimed for resale price maintenance is its ability to provide an adequate margin for the dealer to use in providing "ancillary services" for the manufacturer's product.[12]

The fatal flaw in this analysis is its heroic, and entirely unjustified, assumptions (a) that each retailer receiving a large guaranteed gross margin will use it to promote precisely the right amount of service competition, and (b) that, even if he does so, the public interest is best served by greater promotion expenditures rather than lower prices.[13] At least in the world of retailing, quite the opposite conclusion readily commends itself:

> If consumers flock to the low-margin discount houses and shun the small, high margin shops, they must do so because that is what they prefer. To prevent large retailers from pursuing a low-margin strategy, which at bottom

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[9] *E.g., Bork, The Antitrust Paradox* 284-285, 288-290, 292-294 (1978), cited in Brief for the United States, at pp. 25, 27.

[10] *E.g., Posner,* "The Next Step in the Antitrust Treatment of Restricted Distribution; Per Se Legality," 48 *U. Chi. L. Rev.* 6, 9 (1981), cited in Brief for the United States, at pp. 11, 16, 22.

[11] *Bork,* "Resale Price Maintenance and Consumer Welfare," 77 *Yale L.J.* 950, 951-952 (1968).

[12] *E.g., Posner, Antitrust Law: An Economic Perspective* 148 (1976), cited in Brief for the United States, at pp. 17, 21, 25.

[13] As Professors Gould and Yamey carefully explain, the Bork-Posner analysis confuses the manufacturer's self interest, which well may be parochial, with the general economic interest of society. Even if the manufacturer is right about what is best for him, the net effect of his resale price maintenance policy may well be a decrease in consumer welfare. *Gould and Yamey,* "Professor Bork on Vertical Price Fixing: a Rejoinder," 77 *Yale L.J.* 936, 943-944 (1968).

is what the fair-trade laws seek, is to frustrate the adaptation of distribution channels to meaningful changes in consumer wants and to encourage the perpetuation of obsolete, inefficient channels. . . .

Moreover, the widespread adoption of resale price maintenance tends to deprive consumers of a choice between buying on the basis of service and buying at the lowest possible price. The latter alternative is eliminated unless a substantial segment of the output in each industry is not fair-traded. If there is a genuine consumer demand for service and the other amenities accompanying a high-margin policy, the market will normally support without the coercion of R.P.M. the survival of retailers who satisfy that demand, coexisting with other retailers who cater to the (no doubt much larger) mass of price-conscious consumers.[14]

Moreover it is also apparent that resale price maintenance can have an adverse impact not only on *intrabrand* competition but on *interbrand* competition as well. As Professor Scherer explains:

. . . vertical price fixing not only eliminates price competition among retailers selling a particular manufacturer's product, but may also dampen interbrand competition. It gives oligopolistic producers firmer control over the prices at which their products are ultimately sold, thereby per-

[14] *Scherer, Industrial Market Structure and Economic Performance* 592 (2d Ed. 1980). See also Ricci, "Discount Business Booms, Pleasing Buyers, Irking Department Stores," *The Wall Street Journal*, May 3, 1983, pp. 31, 39; *Gerhart*, "The 'Competitive Advantages' Explanation for Intrabrand Restraints: An Antitrust Analysis," *1981 Duke L.J.* 417, 432 (1981).

> mitting them to prevent retail price shading that might induce retaliatory wholesale price cuts by rival manufacturers.[15]

The literature abounds with statements of a similar nature. For example:

> It seems likely that the objective of most dealer services of the promotional variety is the differentiation of the manufacturer's product from that of its competitors. To the extent this effort succeeds, competing products no longer appear to the consumer as effective substitutes and interbrand competition becomes less effective; the product's price increases may be made without fear of significant loss of trade.[16]

Finally, the Bork-Posner analysis fails to recognize the very real possibility that the manufacturer embarks on resale price maintenance not to promote efficiency but as the unwilling victim of what Steiner calls the "Prisoner's Dilemma":

> When the advice of retailers is important in guiding consumer selection, the industry's manufacturers may voluntarily adopt vertical restraints that raise price and reduce industry output without producing any increase in the quality or aggregate quantity of information provided consumers of the industry's goods. This prisoner's dilemma situation, which may be reasonably common,

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[15] *Scherer, supra* n.14, at 593. *See also Gerhart, supra* n.14, at 428-429.

[16] *Andersen, supra* n.6, at 782. To the same effect, see, *e.g., Comanor,* "Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath," 81 *Harv. L. Rev.* 1419, 1427 (1968): "In the end, vertical restrictions not only eliminate intrabrand competition but also, through their effect on product differentiation, will serve to restrict price competition among the products of different firms."

might occur in a proprietary drug category in which individual brands enjoy a degree of consumer recognition and market power, but "special services" (*i.e.*, the pharmacist's recommendation) also influence consumer buying decisions.[17]

3. Empirical Study Has Shown That Resale Price Maintenance Has Anticompetitive Consequences

Observation of the actual effect of resale price maintenance in practice has shown that it leads to economically antisocial consequences. For example, Professor Scherer observes that "the experience of European countries suggests that resale price maintenance retarded the spread of supermarketing; and the pace of innovation in retailing accelerated perceptibly when legalized R.P.M. was abolished."[18]

Bauer and Yamey report that, in England:

> The introduction of resale price maintenance in the various trades involved the raising of resale prices. It is not easy to measure the extent of the increase in prices, although there is evidence that in some cases retail prices went up by as much as a third. . . .[19]

Similarly, Professor Weiss recites:

> The FTC found that after the introduction of fair-trade laws in the 1930's prices charged by department stores and chains were definitely higher but that prices charged by small independents, especially in small towns, apparently were not. An economist who had a commercial re-

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[17] *Steiner*, "Vertical Restraints and Economic Efficiency," FTC Working Paper No. 66, at p. 11 (June 1982).

[18] *Scherer, supra* n.14, at 592.

[19] *Bauer and Yamey, supra* n.8, at 300.

search firm sample posted retail prices of toothpaste in large cities in both fair- and free-trade states found average prices significantly higher in the fair-trade areas. Five years after having prohibited resale price maintenance agreements, the Swedish government surveyed retail prices in four lines of goods and found them averaging below the manufacturers' recommended price in each case.[20]

Professor Scherer summarizes:

> . . . when R.P.M. attains its primary goals it tends in all but special cases to raise retail margins and prices. This has sometimes been denied by advocates, but the weight of the available evidence supports a conclusion that R.P.M. does raise prices. For instance, a 1965 Justice Department survey revealed that the prices of 132 widely fair-traded products were 19 percent lower than the fair trade minimum on the average in eight cities not bound by R.P.M. laws.[21]

Steiner observes that the history of advances in distributional efficiency is characteristically the history of the introduction of new large-scale, low-cost, low-margin retailing techniques, commencing with the department store and progressing through the mail order house, the chain store, the supermarket and the discount store.[22] The new, capital-intensive retailer enters the fray as a price cutter, and the sorely

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[20] *Weiss, Case Studies in American Industry* 251-252 (1967).

[21] *Scherer, supra* n.14, at 592-593.

[22] *Steiner, supra* n.17, at 14-17. *See also* Sharp, "Resale Price Debate Often Lacks Common Sense," *Legal Times*, May 23, 1983, p. 31.

pressed, labor-intensive, high-cost, traditional retailer attempts to fight back:

> In this recurrent scenario, contrary to the Bork-Posner model, vertical restraints are the result not the cause of increased distributional efficiency! They represent a desperate counterattack on the part of the besieged, less efficient elements in the trade to stem or roll back the rising tide of distributional productivity.[23]

Resale price maintenance deprives the efficient merchant of the competitive advantage of his lower costs and facilitates price stabilization at the manufacturer level. "Thus the maintenance of stipulated resale prices by manufacturers works in two ways to stifle competition: (1) by putting high- and low-cost distributors on the same level and (2) by fostering monopolistic pricing among producers of nationally advertised brands."[24]

Vance has summarized the effects of resale price maintenance with force and clarity:

> Not only is the spirit of the Sherman Antitrust Act violated but the very philosophy of free enterprise is threatened. The guaranteeing of a fixed margin over cost assumes a single level of efficiency for all retailers. Since no allowance is made for different cost structures,

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[23] *Id.*, at 18. Steiner provides an illustration from the toy industry. In the United States, mass advertising and mass retailing of toys led to increased output, lower margins, lower prices, increased research and development and more product innovation. In Europe productivity and innovation were retarded by resale price maintenance, advertising prohibitions, and the low market share of discount houses. *Id.*, at 23-24. Again, when the Wheel of Retailing is prevented from turning, there are serious adverse consequences for the consumer.

[24] *Stocking and Watkins, Monopoly and Free Enterprise* 323-324 (1951).

> the more efficient merchant cannot pass savings on to the consumer. The excessive markup is in effect a subsidy and a way of perpetuating inefficiency. The remarkable growth in the number of discount houses attests to the unreasonable fair trade margins. The unrealistic price rigidity prevents the movement of slow or overstocked items. Loss-leader tactics also lose significance. If the price maintenance practices were adopted universally, our marketing structure would revert from the flexibility of free enterprise to the rigidity of the "planned" economy.[25]

Surely resale price maintenance, having the pernicious effects described above, must remain unlawful *per se*.

B. This Court Need Not Reach the Issue Raised in Part II.B. of the Government's Brief

It is apparent from the opinion of the Court of Appeals, and from the Questions Presented by Petitioner, that this case has been litigated under the assumption that resale price maintenance, or vertical price fixing, is a *per se* violation of the Sherman Act. Working within that framework, Petitioner has raised important questions concerning what types of conduct constitute vertical price fixing,[26] and the proper relationship between the *per se* rule governing resale price maintenance and the rule of reason analysis mandated for non-price vertical

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[25] *Vance, Industrial Structure and Policy* 248 (1961).

[26] "As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label 'per se price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979).

restraints under *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

It is not surprising that the parties and the Court below have treated the *per se* rule against resale price maintenance as settled law. Just three years ago, Justice Powell stated for a unanimous Court that, "This Court has ruled consistently that resale price maintenance illegally restrains trade." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980). In the *Sylvania* opinion itself, Justice Powell noted for the majority that, "the per se illegality of [vertical] price restrictions has been established firmly for many years and invokes significantly different questions of analysis and policy." 433 U.S. at 51, n.18. And again last Term, Justice Stevens in a concurring opinion had occasion to observe that resale price maintenance is "subject to different antitrust analysis" than "other vertical restrictions." *Rice v. Norman Williams Co.*, —— U.S. ——, 73 L. Ed. 2d 1042, 1055, n.5 (1982). *See also Albrecht v. The Herald Co.*, 390 U.S. 145, 157 (1968) (dissenting opinion of Justice Harlan).

It is only the United States Department of Justice, appearing as *amicus curiae* in this private antitrust lawsuit, that invites the Court to take this occasion to overrule the seventy year old *per se* rule against resale price maintenance. Of course, Assistant Attorney General William F. Baxter has widely publicized his opposition to this *per se* rule,[27] and his pronouncements have elicited equally strong support for the rule from many sources, including certain Members of Con-

[27] See, *e.g.*, *Resale Price Maintenance—Antitrust Division View*, 5 C.C.H. Trade Reg. Rep. ¶50,442 (Jun. 18, 1982). It may well be that the public "softening" of the Antitrust Division toward this *per se* rule is one reason for the recent increase in the number of vertical price and non-price restraints imposed by manufacturers of brand name apparel products. See, *e.g.*, authorities cited in note 3, *supra*.

gress and State Attorneys General who are also participating as *amici* in this case. Without intending to criticize the Department of Justice for stimulating this debate or for pressing its policy views as *amicus curiae* in private litigation, Dayton-Hudson submits that the Government has simply failed to carry the day on this issue; rather, a variety of factors should persuade this Court to decline to overrule the *per se* rule against resale price maintenance.

First, as outlined in Part II, *supra*, the Government's economic arguments in favor of abandoning this *per se* rule are largely theoretical as well as highly debatable. The Government concedes that "antitrust defendants have not given the Court any occasion to look carefully at the actual competitive effects of resale price maintenance." Brief for the United States, at p. 19, n.27. This is, in effect, an admission that the *per se* rule has worked reasonably well, or at least that there has not been the kind of "continuing controversy and confusion, both in the scholarly journals and in the federal courts," that prompted this Court to reexamine the relatively short-lived *Schwinn* rule. *Sylvania, supra*, 433 U.S. at 47.

Moreover, it is pertinent to note that the current position of the Department of Justice is itself of recent origin. In earlier years, the Antitrust Division was of course the proponent of the *per se* rule it is now attacking, in cases such as *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). Indeed, more recently, the Antitrust Division has argued for *per se* treatment of even non-price vertical restraints, in cases such as *White Motor Co. v. United States*, 372 U.S. 253 (1963), and *United States v. Arnold, Schwinn & Co.*, 388 U.S. 265 (1967). While there is nothing inherently wrong with the Government rethinking its views on antitrust policy, the

resulting inconsistency greatly weakens the justification for this Court abandoning *stare decisis* and overruling a long-established antitrust rule of law.

Second, Dayton-Hudson submits that this case provides a dangerously narrow factual basis for embarking upon an across-the-board repudiation of the *per se* rule against resale price maintenance. As noted in Part I, *supra*, retailers of basic consumer products function in a different vertical environment than wholesale distributors of agricultural chemicals. The Government's entire economic argument—and the arguments of the economist-judges upon whom the Government most strongly relies—are based upon the distribution problems facing manufacturers who require "ancillary services" from their distributors and who therefore genuinely fear "free riders." In Dayton-Hudson's experience, however, these arguments are simply irrelevant to the retail distribution of basic consumer products. Instead, resale price maintenance in the retail world most often originates with inefficient retailers and thus reflects cartel motives that the Government concedes are anticompetitive and illegal.

Third, Dayton-Hudson submits that there is no credible evidence that manufacturers who require ancillary services from their distributors also need the freedom to impose resale price maintenance. The *Sylvania* decision giving manufacturers greater freedom to impose non-price vertical restraints is only six years old. Assuming that there is a legitimate "free rider" problem, there is no basis for assuming at this time that *Sylvania* was an inadequate answer to that problem. Antitrust defendants constantly attacked the *Schwinn* rule during its ten year life, yet have seldom challenged the long-standing *per se* rule against resale price maintenance. Thus, the infer-

ence that resale price maintenance serves no legitimate competitive purpose is strong.

Moreover, overruling this *per se* rule would pose far greater anticompetitive risks than the Court's decision in *Sylvania*. From Dayton-Hudson's perspective, price-oriented retailers do not like the non-price vertical restraints legalized by *Sylvania*, but they can live with them. On the other hand, there is real doubt that discount and off-price retailing could effectively survive the cartelized world of nationwide resale price maintenance. Thus, the concern expressed by Chief Justice Burger in *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978), is equally present here: that overruling this *per se* rule "would . . . remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby."

Fourth, this Court should not abandon its long-established view that price restraints "involve significantly different questions of analysis and policy." *Sylvania*, *supra*, 433 U.S. at 51, n.18. As Justice Stevens more recently stated in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978):

> Price is the "central nervous system of the economy," United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n.59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. United States v. Container Corp., 393 U.S. 333, 337.

Dayton-Hudson submits that this is not only long-established antitrust doctrine, but it is also sound competition policy. As McNair's Wheel of Retailing illustrates, innovation—at least in the retail world—does in fact spring from price competi-

tion. Therefore, this Court's historic vigilance in protecting pricing autonomy from the restraints of resale price maintenance is an important cornerstone of Sherman Act enforcement.

Finally, Dayton-Hudson submits that the new-found distaste of the Executive Branch for the *per se* rule against resale price maintenance, and the heated antitrust policy debate which has resulted, present an appropriate subject for resolution by the Congress. As Justice Stevens recently stated in *Arizona v. Maricopa County Medical Society*, —— U.S. ——, 73 L. Ed. 2d 48, 65 (1982), a case which involved another price fixing issue:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. [Citation omitted.] Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature.

See also Part IV of Chief Justice Burger's opinion for a unanimous Court in *Texas Ind., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-647 (1981). Moreover, in this case, there is strong reason to believe that Congress has recently "expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and Mc-

Guire Acts allowing fair-trade pricing at the option of the individual States." *Sylvania, supra*, 433 U.S. at 51, n.18.

CONCLUSION

For all the foregoing reasons, Dayton-Hudson Corporation respectfully urges this Court to decline the Government's invitation to use this case as a vehicle for overruling the *per se* rule against resale price maintenance. Rather, this case should be decided on the important, but narrower, issues dealt with by the parties and by the Court of Appeals.

Respectfully submitted,

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